MISSOURI COURT OF APPEALS
WESTERN DISTRICT

COMPLETE TITLE OF CASE:

STATE OF MISSOURI

Respondent

v.

BRYAN M. PIERCE

Appellant

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DOCKET NUMBER WD78739

DATE: October 18, 2016

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Wesley Brent Powell, Judge

Appellate Judges:

Division One
Anthony Rex Gabbert, P.J., Thomas H. Newton, and Alok Ahuja, JJ.

Attorneys:

Natalie Hull, Kansas City, MO — Counsel for Appellant

Attorneys:

Nathan Aquino, Jefferson City, MO — Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, Respondent, v.
BRYAN M. PIERCE, Appellant

WD78739 Jackson County

Before Division One Judges: Anthony Rex Gabbert, P.J., Thomas H. Newton and Alok Ahuja, JJ.

Police officers were dispatched to Bryan M. Pierce's home to check on an emotionally disturbed person after Pierce had called a hotline to report hearing voices, including his cat, telling him to stab himself. Pierce came out onto the front porch to talk with the officers and repeated his claims about voices and his cat urging him to stab himself in the heart. One officer, engaging in small talk with Pierce, offered to check the residence to make sure it was safe if Pierce wanted the officers to do that, and he confirmed with Pierce that no one else lived there, so they would not be surprised in clearing the residence. While one officer waited on the porch for the arrival of an ambulance, two other officers went into the residence at Pierce's request. In plain sight, they saw on a computer monitor a slide show with images of underage girls, some of whom were naked, posing in a sexually suggestive manner. To preserve the evidence, one officer confirmed that the images were not streaming from the Internet by looking in a computer-file folder, which had similar images. The officers removed the computer and its hardware for backing up and processing as evidence. A warrant was secured to search the computer, and more than twenty specific images taken from the computer were found to depict underage girls engaging in sexually explicit conduct. Pierce filed a motion to suppress the evidence as the fruit of a warrantless search and seizure in violation of his constitutional rights. The circuit court agreed with Pierce that, as an emotionally disturbed person, he could not consent to the search but refused to suppress the evidence, applying the exigent circumstances exception, finding that the possibility of a safety issue in the house justified the search. The suppression motion was renewed at trial and denied, and, following a bench trial, the court convicted Pierce of the class B felony of possession of child pornography. Having found Pierce to be a prior and persistent offender, the court asked the prosecutor and defense counsel whether it correctly understood that the range of punishment would be extended to ten to thirty years. They did not correct the court's statement, and Pierce was sentenced to fifteen years of incarceration. Pierce appeals the conviction and sentence.

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.

Division One holds:

In the first point, Pierce argues that the court had a materially false understanding of the possible range of punishment, a claim we review for plain error because no objection was made when the court stated the sentencing range at trial. When prior and persistent offender status is proven, it is the maximum imprisonment term that is affected. The range of punishment for a class B felony is five to fifteen years; enhanced to a class A felony, the range of punishment remains five years as the minimum term and is extended to a potential maximum term of ten to thirty years, or to life imprisonment. An identical error was made in *State v. Cowan*, and we reversed the

sentence finding that it was based on a materially false foundation in violation of due process. In *Cowan,* we did not review the error as a matter of plain error; other case law, however, demonstrates that where the record shows that a sentencing court is under the mistaken impression that it lacks authority to impose a lesser sentence, we must vacate and remand for resentencing even on plain-error review. We grant this point and remand for resentencing.

In the second point, Pierce argues that exigent circumstances did not exist to justify the warrantless search of his residence. We agree that there was no immediate threat of harm to Pierce or others. But we affirm the court's decision not to suppress the evidence, finding that, even if Pierce lacked the capacity to consent to the search, the exclusionary rule did not apply. Because the exclusionary rule is a last resort, triggered only when police practices are "deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system," it cannot be said on the basis of the circumstances in this case that the law enforcement officers could properly be charged with knowledge that Pierce lacked the capacity to consent. They were aware that he had experienced auditory hallucinations and was agitated when they encountered him, but Pierce was also able to recognize that he needed help, call a suicide hotline to secure it, explain to the officers why he was upset, express his desire that officers clear his residence, and respond to questions as to whether they would find anyone inside. It appeared to the officers that Pierce was cooperative and lucid, and they did not need to restrain him. His comments were intelligible and related to the officers' questions. Nothing in the record showed that the officers intended to search the residence to find evidence of any crime or that their offer to "clear the residence" for Pierce was made in bad faith or was a subterfuge to conduct an illegal search. This point is denied.

Therefore, we affirm the conviction, but we vacate the sentence and remand for resentencing only.

Opinion by: Thomas H. Newton, Judge October 18, 2016

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